Separate Statement of Professor Andrew L. Kaufman

The Committee's recommendations validate all second-chance explanatory opinions written "at any time," even in response to public criticism, so long as the subsequent opinion is based solely on the facts in the record and reflects the judge's reasoning at the time of the original decision, whether or not that reasoning was previously articulated.

I disagree with the permission given to file a subsequent opinion "at any time."

I disagree with the permission given to respond, by a subsequent opinion, to media, political, and other public criticism.

I disagree with the safe harbor provided by the Committee to protect its recommendations from attack under Canon 2 for judges who write subsequent opinions. The safe harbor protection turns out, on further analysis, to be illusory and overly restrictive or chilling with respect to judicial speech in specific situations.

I would limit the permission to write subsequent opinions to three situations: *sua sponte* (as opposed to a response to public criticism) within a given number of days of the original decision unless the judge has specifically stated that a subsequent opinion will be forthcoming; in response to the request of a party pursuant to the rules of procedure; and at the direction of an appellate tribunal.

I also disagree with certain aspects of the education exemption.

I agree with the Committee's proposal as it relates to judges' ability to respond to charges about their conduct.

Permission to Write A Second-Chance Opinion At Any Time

The Supreme Judicial Court's charge to this Committee to clarify Section 3B(9) of Rule 3:09, the Code of Judicial Conduct, requires the accommodation of competing public interests. Permitting the judge to write a subsequent opinion to explain a decision rendered without any explanation may be said to educate the public and to advance judicial accountability. The judge's reasons replace silence and suspicion. A judge also has an interest, some would say a First Amendment interest, in self-defense against public criticism. The strength of these interests is weakened by the fact that the judge already passed up, for any of a variety of possible reasons, an opportunity to explain, to educate, and to be accountable to the public. It is also weakened by the fact that the "educate the public" justification is not altruistic. It is usually triggered by the desire to defend against public criticism.

Permitting a second-chance opinion also implicates the quite different public interest in maintaining a judicial role that both is, and appears to be, impartial, free of extrajudicial pressure,

and faithful to the judicial role. An opinion issued to explain a decision rendered several months or even years before may well be regarded as unfair, especially if it surprises litigants who now assert that they had a basis for appeal that was unknown to them. Even if a method is found for appeal, it may be too late to undo, say, the effects of a bail application decision now believed to have been wrongly denied or granted. In other situations if the Court adopts the Committee's recommendations, presumably it legitimates the use of the second-chance opinion in later proceedings in the matter and as precedent in other cases.

In my view, the Committee's conclusion that a subsequent written opinion, if appropriately rendered, is part of official duties and is not "public comment" is correct. The principal job of judges is deciding controversies between parties. They do so in the courtroom by issuing orders and writing opinions explaining their decisions. Statements of the reasons for their decisions are communicated through those opinions. Considerations of propriety, impartiality, and the appearance thereof of both, enshrined in Canon 2 of Rule 3:09, have long dictated that judges do not explain their own decisions by way of newspaper interviews.

I part company with the Committee's conclusions with respect to the relation between Rule 3:09 and the performance of "official duties" by way of subsequent written opinions. As the Committee's Memorandum of Observations notes, the Preamble to Rule 3:09 makes it clear that Rule 3B(9) is subject to Canon 2, which speaks in general terms of the need for judges to avoid impropriety and the appearance thereof. As the Preamble and Opinions of the Advisory Committee on Judicial Ethics make clear, the effect of Canon 2 is to modify provisions of other Canons that seem to endorse particular conduct across the board. The Committee, however, decrees that so long as a subsequent opinion is based solely on the facts in the record and reflects the judge's reasoning at the time of the original decision, whether or not that reasoning previously was articulated, the issuing of that subsequent opinion does not violate Canon 2, even if the opinion is delivered months or even years later and is delivered in response to public criticism.

I believe that that interpretation of Canon 2 is both disingenuous and wrong with respect both to the matter of timing and public criticism. As to timing, judges may well be able to conclude that subsequent opinions issued within a short time after the original decision reflect their original reasoning, but judges ought to be quite wary in concluding that opinions written many months or years after the original decision meet that standard. The very fact that a judge concluded that the press of business precluded writing an opinion at the moment of decision suggests that the matter quickly disappeared from the judge's mind. A judge criticized heavily in the media as a result of later events may have little memory of the matter but may decide to look at the record. The judge may then be clear that the original decision was correct. If the judge wants to respond to the criticism, the temptation will be strong to conclude that the current reasoning based on reading the record must have been — nay, was — the original reasoning and therefore the "safe harbor" exception permits a response. The passage of time and the fact that the second-chance opinion is being written for publication, however, will invariably affect this conclusion.

Cynthia Gray, director of the Center for Judicial Ethics of the American Judicature Society and one of the leading experts, if not *the* leading expert, on judicial ethics said it well with respect to both the timing and the response to public criticism issues in a letter to the Boston Globe on February 11, 2008:

> . . . the credibility of the courts does not depend on judges responding to demands for explanations for unpopular decisions. Judges can and do explain their decisions — on the record, in writing, or orally with all parties present — to fulfill their primary responsibility to the litigants in a case. To educate the public, a judge may then respond to criticism by reiterating without elaboration what is set forth in the public record. By refraining from other public comment, judges assure the public that their cases will be tried, not in the press, but in the public forum devoted to that purpose.
>
> Judges decide hundreds of issues in hundreds of cases every year. Any explanation for one of those decisions, months or years later in response to criticism, could not reasonably be seen as reflecting the decision-making process at the time and would no doubt be further attacked as self-serving and unsatisfactory. The administration of justice would be distorted, and confidence in the courts undermined, as the public watches the media and politicians manipulating the judiciary.

It is very difficult to judge the effect of the Committee's interpretation of Canon 2 on the willingness of judges to write subsequent explanatory opinions. On the one hand, the provision that a judge may write a subsequent opinion "at any time," and even in response to public criticism, assuming that the case is still pending, seems to promise immunity from any assertion of a violation under Canon 2. On the other hand, the immunity is conditioned on the requirement that the subsequent opinion is based solely on the facts in the record and reflects the judge's reasoning at the time of the original decision, whether or not that reasoning previously was articulated. I do not know whether the Committee thinks that judges will be safe because disproving a judge's statement that the second-chance opinion reflects the original reasoning will be exceedingly difficult. But such a view would be misplaced. Canons 2 and 2A prohibit impropriety and require impartiality but also explicitly refer to the appearance of impropriety and the appearance of impartiality. A second-chance opinion written long after the original decision will, in my view, very often, maybe even nearly always, fail the appearance test.

Moreover, there is severe tension between the explicit permission the Committee gives to judges to write a memorandum supplementing a prior oral or written articulation of reasons and the condition imposed by the Committee that the subsequent opinion reflect the judge's reasoning at the time of the original decision. Presumably, the original explanation is the one that most accurately "reflects the judge's reasoning at the time of decision." Especially when the

judge's supplementary opinion is written many months later, the danger is great that the condition justifying its issuance will be violated. The Commentary takes note of the fact that noncompliance with the condition may violate Canon 2 and it gives as an example an intentional misstatement of the record or the rationale for the decision. But it seems to me at least that an issue would be raised in the much more likely situation of a negligent misstatement of the record. A judge criticized in the press for a decision made without an opinion may be tempted to respond as soon as possible. The judge may be confident about remembering the record and may write a second-chance opinion on that basis. The judge may turn out to be wrong, and sufficiently wrong to violate Canon 2. Judges should therefore be advised that negligent misstatement of the record may well, in some circumstances, fall within the language in the Commentary to Section 2A which states that the "test for imposition of sanction for violation of this Canon is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."

Indeed, there are situations in which I believe that the Committee's recommendations are, or may be construed to be, overly restrictive of judicial freedom. Suppose that a judge, within a day or two of an original decision made with an oral statement of reasons, realizes that she forgot a particular fact or legal basis on which the original decision should have been based. May the judge issue a supplementary opinion on the record? The Committee's Commentary gives a safe harbor if the subsequent opinion "reflects the judge's reasoning at the time of the original decision." But the judge has changed her mind about the correct basis for the decision. Does the safe harbor provision suggest that the judge is running a risk in filing a subsequent opinion that does not meet the safe harbor test? I think a "yes" answer ought to be wrong. So long as there is no jurisdictional rule that constrains the judge, I think she should be able to file the supplemental opinion shortly after the original decision. The parties could then take whatever action they saw fit. But if the Committee agrees with this response, then the question becomes: when does the Committee's "condition" that a supplemental opinion must state the reasoning at the time of the original decision become operative? The Committee states that "it appears unworkable to formulate a precise time limit when issuance of a written memorandum appropriately should become prohibited public comment." I disagree about the "unworkability" conclusion, but unless the Committee means to preclude judges from ever writing a subsequent opinion that supports a decision on a different basis, then someone will have to formulate a time limit during which the Committee's "condition" is initially inoperative if its recommendations are adopted. Otherwise individual judges will simply have to guess.

The Committee in its Memorandum of Observations seeks to avoid the problems of the safe harbor by leaving the decision to the judge's sound discretion rather than creating an ethical rule. In my view, an "ethical" rule is needed when a second-chance opinion has a strong whiff of appearance of impropriety. But in any event, Rule 3:09 is not just a compendium of so-called "ethical" rules relating to "official" and "nonofficial" conduct. In Canon 3 alone a judge is told to "hear and decide matters assigned to the judge"; to "be faithful to the law and maintain professional competence in it"; to "maintain order and decorum in proceedings before the judge"; to "be patient and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity"; to "require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, or socioeconomic status, against parties, witnesses, counsel, or others." The judge is also told that the judge "may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle civil matters pending before the judge" and that the "judge shall dispose of all judicial matters promptly, efficiently, and fairly." Other Canons cover subjects such as the ability of judges to engage in civic and business activities, fund-raising, and politics, while others cover various provisions relating to the judge's financial activities. Rule 3:09 does not leave it to the prudence and good sense of individual judges to decide whether they should comply with any of these listed requirements, most or all of which do not involve matters of ethics, even if the word "ethics" is broadly defined. The Court itself has decided in Rule 3:09 that the judicial role demands that certain standards of conduct should be obeyed. I think it should do so here.

One test of the operation of the Committee's recommendation is how it would operate in a situation similar to the one that led to creation of this Committee. A second-chance opinion could not "educate the public" about the release on personal recognizance of a defendant who subsequently committed murder. The opinion could not even refer to the subsequent murder because it would not have been in the record.

Response to Public Criticism

The Committee's recommendation is that it is up to the judge to decide whether to write an opinion in response to public criticism. The safe harbor

provision is designed to banish the public criticism from the judge's mind as he or she complies. "Don't think about the public criticism. Put yourself back in time to the original decision and write the opinion you would have written then." While the Committee would have us believe that the purpose of the second-chance opinion is to educate the public, the opinion in most cases would not be written if there had been no public criticism. The permission given to judges to write a later supplementary opinion when an original opinion was lengthy underlines the "response to public criticism" purpose of the recommendation. But judges are supposed to free themselves as much as possible from outside pressure, from political or media influence. This is indeed one of the arguments made so often in favor of a system of appointed as opposed to elected judges. It will be difficult to write an opinion, months or years after a case was heard, in response to political or media criticism without being defensive in the face of that criticism.

In my view, the more time that has passed from the original ruling, the greater the threat to impartiality (and the appearance of impartiality) of the subsequent opinion. In addition, responding to public criticism of a decision by writing an opinion seems to conflict with the public comment prohibition in the Committee's recommendations. I agree with the Memorandum of Observations that a Letter to the Editor is "fundamentally different" from an opinion on the record. However, the Committee's recommendation virtually directs judges who want to respond to public criticism to do so in the form of a second-chance opinion to be filed on the record. With today's modern technology, that opinion may then be disseminated widely to the media and on the internet. A Letter to the Editor will be the purpose of most such second-chance opinions. No one will be fooled. Such an opinion may well subject judges to further criticism. Yes, as the Memorandum of Observations states, "Judges traditionally speak from the bench and through their memoranda," but judges traditionally do so when they render decisions and not long afterwards, in response to public criticism, while the case is still pending.

The Memorandum of Observations makes the point that the recommended Rule is permissive; the judge does not have to respond. But the judge who does not remember the complete record, or does not want to take the time to write an opinion, or does not believe it appropriate to do so after the fact will be met by the argument that the Rule has been changed to increase public education and judicial accountability, and the judge's refusal to take advantage of the new Rule is further

reason for criticism. A true catch-22. A Rule designed for judicial protection, among other things, may well lead to more criticism of individual judges. In the end, I think the recommendations push judges toward responding to public criticism in pending cases where they have not previously written an opinion, without giving them as much protection as the recommendations seem to promise. I do not believe that this is an imaginary parade of horribles and that the problem will arise only rarely. I regard the recommendations as an invitation by the Committee, and by the Court if it adopts the recommendations, to enterprising newspaper reporters to follow the dockets and to call upon judges to explain any and all decisions that they find problematic, especially in sensitive areas where there is the possibility of some public or private harm. The Memorandum of Observations states the belief that the advantages of public education given by the second-chance opinion will outweigh the disadvantage of the pressure on judges to write such opinions. In my view, whatever education follows such opinions will be the wrong kind of education as to what judges do. It is precisely because I think judges ought not be writing second-chance opinions in response to public criticism that I regard the Committee's recommendations on this score as harmful, not helpful, to public education about the judicial role.

An Appropriate Section 3B(9)

As stated at the outset, my own inclination is to limit the ability of a judge to write a subsequent opinion to three situations: *sua sponte* (as opposed to a response to public criticism) within a specific number of days of the original decision unless the judge has specifically stated that a subsequent opinion will be forthcoming; in response to the request of a party pursuant to the rules of procedure; and at the direction of an appellate tribunal. I disagree with the Committee's view that it is "unworkable" to set a precise time limit for a judge to write a subsequent opinion on his or her own. Court rules set specific time limits all the time in a variety of circumstances. Here the task is to answer the question: in the typical case, how long is the time before it becomes unreasonable to conclude that a judge will be able to reconstruct the reasoning of an original decision sufficiently to be able to put it in opinion form and give the litigants time to take any necessary action? Judges can answer that question better than I, but my lay view suggests a 10–30 day range. But having limited the permission to write a subsequent opinion in this fashion, I would not restrict the judge, as the Committee has done, to writing the opinion he or she would originally have

written. The parties will be available to take any desired action if the judge relies on different facts or a different legal theory.

The Education Exemption

Since the permission given to judges to write and lecture about legal and nonlegal subject matter granted in Canon 4B is specifically made subject to the other provisions of the Code, it seems correct to broaden the category of settings in Canon 3B(9) in which a judge may comment about legal matters. Surprisingly, after this Committee has labored so diligently to clarify judges' ability to comment about their own pending cases in the exercise of their "official duties," it seems to permit judges to comment publicly about those cases in anything that qualifies as a scholarly setting. This is all the more surprising given the Committee's recognition of the speed at which such comment may get transferred to the general print and digital media by modern technology. If judges, in the exercise of judicial duties, are supposed to comment on their pending or impending matters only in the courtroom or on the record, then I think it needs no extensive argument to make the case for the proposition that the education exemption ought not to extend to the judge's own pending or impending cases. If the answer is that all comment by judges about their own pending cases is prohibited because it would interfere with fair hearings of the cases, then the Commentary should say so. But it would be a lot clearer simply to eliminate judges' own pending and impending cases from the exemption.

I also do not understand the continued restriction in Canon 3B(9)(b) that limits the ability of judges to comment publicly in scholarly settings to appellate cases. That limitation would appear to prevent, say, a juvenile court judge teaching lawyers or law students about issues in their courts from discussing the pending "cutting edge" issues affecting practice in their courts unless they involved appellate cases. A similar restriction does currently exist in the present Canon 3B(9), but at least now such discussion might be justified under Canon 4B. The Memorandum of Observations justifies the restriction on the ground that removal "would create the potential of judges engaging in what may be perceived as unseemly discussions about their own colleagues' decisions." That justification seems surprising in view of the Memorandum's earlier willingness, in connection with issuing a second-chance opinion, to rely on "the prudence, good sense and

sound judgment" expected of judges. In any event, if unseemly discussions by judges of their own colleagues' decisions are a real concern, then I do not understand why appellate court judges are permitted to comment about their colleagues' cases. All Massachusetts judges are colleagues of one another, and if the Committee's justification for the appellate cases limitation is correct, the whole education exemption needs to be rethought.